

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 02

FOX TELEVISION STATIONS, LLC

and

TELEVISION BROADCASTING STUDIO
EMPLOYEES UNION, LOCAL 794,
I.A.T.S.E.

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: Case 02-CA-246371
: Hon. Lauren Esposito

**BRIEF ON BEHALF OF RESPONDENT
FOX TELEVISION STATIONS, LLC**

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I. PRELIMINARY STATEMENT

On August 9, 2019, Region 2 issued a Complaint against the Respondent, Fox Television Stations, LLC (“Company”), alleging that the Company violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“Act”). Specifically, it alleged that editing performed by WNYW’s Public Affairs Producer, Joseph Silvestri, changed the terms and conditions of employment of television technicians represented by the Television Broadcasting Studio Employees Union, Local 794 I.A.T.S.E. (“Union”).

The Charge should be dismissed because it is time-barred under Section 10(b) of the Act as it was not filed within 6 months of the alleged unilateral change. The Union admitted that they knew Mr. Silvestri has been the Station’s only Public Affairs Producer and had been editing all its public affairs programs since 2010, but the Union did not file the Charge claiming his editing was unlawful until nine years later in August of 2019. The Union’s attempt to circumvent Section 10(b) by claiming that the editing Mr. Silvestri performed after he received an additional manager title constituted the unlawful change should be rejected. Mr. Silvestri received the additional title in 2015, four years before the Union filed its Charge.

Even if the Union’s Charge had been timely, which the Company denies, it should be dismissed because Mr. Silvestri’s editing has been the “status quo” since 2010. It is well-established that an employer does not violate the Act if it maintains the status quo after the expiration of a collective bargaining agreement. The Board has held that the status quo is defined by reference to the substantive terms of the collective bargaining agreement and past practice.

In 2010, the Company and the Union agreed to add a provision to the collective bargaining agreement allowing non-bargaining unit employees performing the job of Public Affairs Producer to edit public affairs shows. The Union admitted that since 2010 Mr. Silvestri has been the only employee at the television station who has produced its public affairs shows and the only employee who has held the title of Public Affairs Producer. The Union also knew that Mr. Silvestri has been editing his public affairs shows since 2010. Indeed, there was a mountain of evidence at the hearing establishing that Joe Silvestri has never relinquished the title of “Public Affairs Producer” since he took that job at the Station 13 years ago. At all relevant times, Joe Silvestri was, and is, the only “Public Affairs Producer” at the Station.

The Union alleged that the additional manager title the Company gave Mr. Silvestri on his profile with the Human Resources Department in 2015 constitutes an unlawful change. The Charge should be dismissed because this alleged hypertechnical change did not impact the bargaining unit. The Board has held that an employer does not violate Section 8(a)(5) where the alleged unilateral change did not involve a departure from past practice, did not effect a change in terms and conditions of employment, and did not significantly impair tenure, security or work opportunities for bargaining unit employees. At the hearing, the Union produced no evidence whatsoever to support the claim that bargaining unit employees lost any work, work opportunities or wages as a result of editing performed by Mr. Silvestri. The Union did not cite even a single bargaining unit employee who was impacted or may be impacted in the future.

The Company's payroll records, on the other hand, showed that bargaining unit employees lost no editing work whatsoever as a result of Mr. Silvestri performing editing work after 2015. In fact, their total pay either stayed the same and/or went up. Importantly, the Union's President admitted that, if Mr. Silvestri was not allowed to edit his public affairs shows in the future, bargaining unit employees would not necessarily get the work. He admitted that the Station was free to have Mr. Silvestri continue to edit by changing the title on his Human Resources profile or appoint another non-union person as a producer to edit the public affairs shows. He admitted that the Company was free to assign an unlimited number of non-bargaining unit producers to edit public affairs programming.

II. PROCEDURAL HISTORY

The Union filed an Unfair Labor Practice Charge ("Charge") with the Board on or about August 9, 2019 alleging that the Company violated Sections 8(a)(1) and 8(a)(5) of the Act.

(General Counsel Exhibit "GC Exh." 1) Specifically, the Charge alleged:

The Union filed a grievance alleging that Fox violated the CBA by allowing a manager to edit which is expressly defined as bargaining unit work. Fox denied the grievance on July 18, 2019, and has continued to allow the manager to perform this bargaining unit work. Fox's conduct is an express repudiation of a contract term, a unilateral change in terms and conditions and has caused bargaining unit members to lose wages.

(GC Exh. 1)

On November 22, 2019, the Region issued a Complaint against the Company alleging that, “[o]n or about February 21, 2019, Respondent changed employees’ terms and conditions of employment by assigning Public Affairs Manager Joe Silvestri to perform bargaining unit work, specifically, linear editing.” (GC Exh. 1) The Company filed its Answer and Affirmative Defenses to the Complaint on December 5, 2019 denying the above allegations. (GC Exh. 1)

On March 9, 2019, the Board amended the Complaint to include Local 819 and change the word “linear” to “non-linear” in paragraph 8. (Tr. 8:2-9:9)

On March 9 and 10, 2019, a hearing was held in New York, New York before the Honorable Lauren Esposito.

III. STATEMENT OF FACTS

A. The Television Station

WNYW-TV (Channel 5) and WWOR-TV (Channel 9) (collectively the “Station”) are local television stations in the New York City market that broadcast programming 24 hours a day, 7 days a week. Each week, the Station produces and broadcasts over 40 hours of news programming on WNYW. (Tr. 77:6-15) In addition to news programming, the Station produces two weekly public affairs shows named “*Good Day Street Talk*,” and “*New Jersey Now*.” (Tr. 214:12-19) *Good Day Street Talk* airs on WNYW each Saturday from 6:00 a.m. to 6:30 a.m. (Tr. 214:15-16) *New Jersey Now* airs on WWOR each Sunday from 12:00 p.m. to 12:30 p.m. (Tr. 214:22-24) The Station also periodically produces some half hour public affairs specials about events or topics that may be of particular interest to the New York community. (Exhs. 27 - 31)

In order to satisfy the broadcast license requirements of the Federal Communications Commission (“FCC”), the Station is required to produce and air programming that is pertinent to the New York community and its people. (Tr. 286:25-287:8) Accordingly, the Station’s weekend public affairs shows and public affairs specials focus on topics including health, education, arts, politics and community events. (R. Exh. 19, 20 and 36) For example, in evidence is a recording of the Station’s *Good Day Street Talk* show broadcast on January 25, 2020 hosted by Antwan Lewis about dance in the community. (R. Exh. 36) In it, Mr. Lewis interviewed the CEO of Ballet Hispanico about the art of dance to express the experiences of Latino and Hispanic Americans, and the Director of 651 Arts, a Brooklyn-based dance group that

uses dance and movement to portray the cultural experiences of the African Diaspora. (R. Exh. 36) In the same episode, Mr. Lewis also interviewed the head of the Council for Unity, an organization that has focused on teaching leadership, tolerance and advocacy in schools and communities. (R. Exh. 36)

B. The Collective Bargaining Agreement Expressly Allows Producers To Edit

The Company is a party to a collective bargaining agreement (“Agreement”) with the Union which is currently expired. (Jt. Exh. 2) The Company employs approximately 115 technicians in New York who perform technical work for the Station and are covered by the Agreement. (Tr. 34:24-35:1)

Section 1.09 of the Agreement allows persons who are not part of the bargaining unit, including producers, to perform certain bargaining unit work. The introduction and preamble to Section 1.09 entitled “Work Assignments” provides:

Section 1.09 – Work Assignments:

Notwithstanding any contrary provisions of the CBA, certain work assignments are permitted pursuant to this Section 1.09. This is in addition to (or in some cases in conjunction with exceptions as expressed in Section 1.03(c)). Nothing in this section shall preclude the Union from contending through appropriate legal proceedings that any non-bargaining unit employee should be included in the bargaining unit by virtue of being assigned such work, nor shall such assignment be evidence that the employer believes such employee should be included in the unit.

(Jt. Exh. 2, p. 7)

Subsection (b) of Section 1.09 addresses “non-linear editing” work assignments. It permits the Station’s Public Affairs Producer, among others, to perform such editing. It states:

(b) Non-Linear Editing Work Assignments.

The Company recognizes that editing is under the jurisdiction of the bargaining unit and that non-bargaining unit personnel will supplement bargaining unit editors only as set forth in this Section. Bargaining unit editors will continue to edit promos and news pieces.

Only the following job categories of employees may perform non-linear editing functions:

1. *News Department Executive Producers, Senior Producers, Producers, Segment Producers, Writers and Reporters.*
2. *Creative Services Managers, Promotion Producers, and Marketing Producers*
3. *Sales Department employees, but not for air.*
4. *Public Affairs Producers.*

The above four listed job categories include individuals who are “upgraded” into such positions as allowed under an applicable collective bargaining agreement. Under no circumstances will anyone be reclassified to circumvent the express language contained in this Section 1.09.

Any employee, including but not limited to non-represented (Station) employees, per diem or daily employees and/or temporary employee(s) assigned to fill in a staffing vacancy in any of the categories (1) through (4) above may also perform non-linear editing functions under full effect of this Section 1.09.

Any individuals described herein must have a direct editorial connection to the non-linear editing assignment and the piece must be one to which they are assigned. The individual’s job, not editing, continues to be the primary job function of these individuals.

(Jt. Exh. 2, p. 9) (emphasis added)

The second sentence of Section 1.09(b) establishes that the Union agreed that bargaining unit employees would no longer continue to edit the Station’s public affairs programming. Specifically, it states that “[b]argaining unit editors will continue to edit promos and news pieces,” but it does not mention that bargaining unit editors will continue to edit public affairs programming. (Jt. Exh. 2) At the hearing, the Union President explained what constitutes a “promo” as that term is used in the second sentence of Section 1.09(b). (Tr. 78:18-79:1) He explained that promos are different from, and do not include, public affairs shows. (Tr. 79:2-15) He testified that the term “news pieces” in Section 1.09(b) refers to material produced by the News Department, and he acknowledged separately that public affairs shows were not produced by the News Department. (Tr. 80:20-25) Lastly, he explained that the total number of hours of news programming produced by the Station amounts to between 40 and 50 hours per week. (Tr. 76:6-15) This is compared to public affairs programming which amounts to just one hour per week. (Tr. 214:11-215:1) This means the work editing the public affairs programs which the Union agreed to give up in Section 1.09(b) was relatively miniscule compared the editing for

news pieces and promos that bargaining unit employees would continue to perform going forward.

Section 1.09(b) expressly permits non-bargaining unit employees to edit if they perform the functions of the jobs listed therein. It is significant that no part of Section 1.09(b) uses the term “job title” or “title.” Section 1.09(b) sets forth a list of four groups and refers to them as “job categories.” The last sentence of Section 1.09(b) emphasizes that the focus of the provision is the work or “job function” of the non-union employee, not his or her title, that determines whether he or she is permitted to edit. It states “[t]he individual’s job, not editing, continues to be the primary job function of these individuals.” (Jt. Exh. 2, p. 9) (emphasis added)

Any person who steps into the role of the jobs listed in Section 1.09(b) is permitted to edit even if they do not have the job title listed. (Jt. Exh. 2) Directly below the list of jobs in Section 1.09(b), it states that the persons who are permitted to edit include “individuals who are ‘upgraded’ into such positions.” (Jt. Exh. 2, p. 9) It also states that “[a]ny employee, including but not limited to non-represented (Station) employees, . . . assigned to fill in a staffing vacancy in any of the categories (1) through (4) above may also perform non-linear editing functions” (Jt. Exh. 2, p. 9)

Employees who do not have job titles matching the jobs listed in Section 1.09(b) are still permitted to edit as long as they are performing the role or job function of the jobs listed. The Union’s President admitted that the jobs listed in Section 1.09(b) are not just job titles. When asked whether the positions listed are “job functions” or “job titles”, the Union’s President responded “I would say both.” (Tr. 36) He immediately followed his response by explaining that non-bargaining unit employees who do not have titles matching the jobs listed in Section 1.09(b) may still edit. He testified:

Q. Can you explain what it means for an individual to be upgraded?

A. I guess the easiest example would be in the News Department there are employees that are referred to as PAs or Producer Assistants. They’re oftentimes or sometimes upgraded to writer, and that changes their job function when that happens. They’ve - There’s a pay increase. The job function changes. They become a Writer for the News Department.

Q. And if they’re upgraded to that Writer position, they’re allowed to edit under this contract?

A. That is correct.

(Tr. 36:13-23) (emphasis added)

Even if Section 1.09(b) did use the word “title”, which it does not, the Union admitted that employees at the Station may have different jobs and more than one job title. The Union’s President testified that photographers in the bargaining unit both shoot with cameras and edit video even though they are identified by the title of “photographer” and do not hold the title of “editor.” (Tr. 340:24-341:8) He further explained that employees known as photographers also hold the title of “technician.” (Tr. 341:24-341:8) When pressed on cross examination, he admitted that they are known as both a “photographer” and a “technician.” (Tr.341:9-16) When asked whether the word “category” used in the collective bargaining agreement was meant to describe several jobs, the Union’s President responded unequivocally “Yes.” (Tr. 350:13-351:7)

On cross-examination, the Union’s President testified that it was not the employee’s job title that mattered for purposes of Section 1.09(b), but whether he or she was assigned to the “role” of one of the jobs listed therein. When asked if an employee with the title “Production Assistant” or “News Assistant”, which are not on the list in Section 1.09(b), can still edit if the employee was to “step into the role” of a “Writer”, which is listed, the Union’s President admitted that the person’s role was determinative and that he or she “can edit” in those circumstances. (Tr. 81:15-82:15)

The Union’s President testified that one of his “primary responsibilities” was to ensure that the jurisdictional provisions of the collective bargaining agreement such as Section 1.09(b) were honored by the Company. (Tr. 105:14-106:10) With respect to Section 1.09(b) regarding who may edit, he asserted: “[i]t was very significant. We were opening up our jurisdiction to managers for the first time.” (Tr. 109:4-10) He testified that he and the Union gave “careful consideration of any allowances for non-bargaining unit personnel to do bargaining unit work.” (Tr. 109:11-110:3) He stressed that, with respect to Section 1.09(b), he and the Union gave “careful consideration” to deciding “which, if any titles would be included in the exceptions under Section 1.09b.” (Tr. 110:1-6)

Section 1.09(b) was not contained in the parties’ collective bargaining agreement prior to 2010. (GC Exh. 20, p. 7) It was undisputed at the hearing that the Union agreed to add Section 1.09 in 2010 in order to allow the Station’s producers to take advantage of efficiencies created by advances in editing technology. (Tr. 66:1-67:11, 71:12-16; Jt. Exh. 2, p. 9) The evidence at the

hearing, including testimony from the Union's President, established that advances in editing technology, such as digital camera recording and personal computers and software, transformed the editing process from a two-person job to a one-person job. (Tr. 67:2-68:22, 227:13-228:7) Years ago, cameras used by news organizations stored recorded footage on tape such as VHS and Beta. (Tr. 227:17-228:7) The recorded material was then transferred to large, cumbersome videotape editing equipment, and the editing was performed on the highly complicated and specialized videotape equipment. (Tr. 227:15-228:7; R Exh. 13) Technicians, including those represented by the Union, were the only employees with the skills to operate the videotape editing equipment. (Tr. 228:3-7) As a result, producers, writers, reporters and other persons who knew the editorial content of programming material had to stand over the shoulder of a technician in a specialized edit room and instruct the technician what material to cut, when to cut it and/or perform other types of video or audio edits. (Tr. 226:4-8)

Ultimately, the advances in computers, software and digital storage of video and audio material allowed the television industry to move to an editing process known as "non-linear" editing which, compared to linear videotape editing, is simpler, faster and results in a higher quality final video product. (Tr. 66:12-21) Non-linear editing can be done by non-skilled technicians from any desktop personal computer or laptop computer. (Tr. 68:15-22, 235:10-13, 237:15-16) This means a producer, writer, or reporter at the Station could edit their own material and no longer had to wait for a bargaining unit technician to become available to edit, nor did they have to stand over the technician's shoulder and instruct the technician what to edit. (Tr. 68:15-18)

The Union's President admitted that the Union agreed to add Section 1.09(b) to the Agreement knowing it would allow non-bargaining unit producers to edit their own shows even though bargaining unit editors had previously done the editing. (Tr. 38:23-39:2, 71:23-72:7) In other words, the Company and the Union agreed in negotiations that a two-person job of editing would become a one-person job. The Union's President further admitted that Section 1.09(b) has no limit whatsoever on the number of public affairs producers who could perform non-linear editing work at the Station. (Tr. 75:10-20)

C. **At All Relevant Times, Joe Silvestri Was, And Is, The Only Public Affairs Producer At The Station**

The job duties of a television show “producer”, including a public affairs producer, were not in dispute at the hearing. A producer is responsible for all aspects of the television show to which the producer is assigned, including but not limited to, selecting topics to be covered in the show, researching those topics, identifying guests to appear on the show as interviewees or panel participants, contacting and communicating with the guests, booking the guests, writing talking points and/or scripted questions for the hosts of the show, condensing research for the hosts, determining the dates on which the show will be taped and where it will be taped, identifying the technical crew for taping the show, attending and supervising the taping of the show, conducting off camera interviews, and lastly editing the video and audio material that was recorded into a final package ready for broadcast. (Tr. 61:24-62:10, 62:23-63:16, 219:22 – 220:17)

The résumé Mr. Silvestri submitted when he was hired by the Station shows that he was a television “producer” for 10 years before his employment at the Station. (R. Exh. 2; Tr. 212:19-21) His profile on LinkedIn also shows that he began working as a television producer in 1995. (GC Exh. 24)

At all relevant times, Joe Silvestri was, and is, the only producer of the public affairs programs and the public affairs specials at the Station. He became a “Public Affairs Producer” at the Station in 2007. (Tr. 213:12-17) Since 2009, he has been the only Public Affairs Producer at the Station and has produced every one of its public affairs shows. (Tr. 214:5-7) This includes, but is not limited to, the weekly public affairs programs “*Good Day Street Talk*,” and “*New Jersey Now*” and all other public affairs specials. (Tr. 213:14-21)

It is public knowledge in the New York television market that Mr. Silvestri is the Station’s “Public Affairs Producer.” The written credits that appear on the viewers’ television screens at the end of a broadcast in New York identify Mr. Silvestri as the “Producer” of the Station’s public affairs shows. Although Mr. Silvestri testified that credits do not always appear at the end of the Station’s shows due to time constraints, he nevertheless shared examples of shows dating back to 2012 identifying him to the viewers with the title of “Producer.” (Tr. 261:4-264:16; R Exhs. 21 - 26) On January 28, 2012, Mr. Silvestri was credited as “Producer” for “*Good Day Street Talk*.” (R Exh. 21) (emphasis added) On June 21, 2013, he was credited as “Producer” for the public affairs special named “*Go To Your Room*.” (R Exh. 22) (emphasis

added) On November 28, 2014, he was credited as “Producer” for a public affairs special named “*The Hard Rock Rocks Times Square For St. Mary’s Kids.*” (R Exh. 23) (emphasis added) On November 20, 2015, he was again credited as “Producer” for a public affairs special named “*The Hard Rock Rocks Times Square For St. Mary’s Kids.*” (R Exh. 24) (emphasis added) On July 22, 2017, he was credited as “Producer” for *Good Day Street Talk*. (R Exh. 25) Recently, on May 23, 2019, he was credited as “Producer” for a public affairs special named “*Tower Of Heroes.*” (R. Exh. 26) (emphasis added)

Mr. Silvestri’s work producing public affairs shows for the Station has earned him several Emmy awards and Emmy nominations in the television industry where he has been identified with the title of “Producer.” (Tr. 266:8-25, 268:20-269:13; R Exhs. 27 - 28) In 2017, Mr. Silvestri won an Emmy for his work as “Producer” on “*Lyme & Reason: The Cause & Consequence of Lyme Disease.*” (R Exh. 27) (emphasis added) Most recently, on May 4, 2019, Silvestri was awarded another Emmy for his work as “Producer” on “*Good Day Street Talk Celebrates Black History Month.*” (R Exh. 28) (emphasis added)

Mr. Silvestri has also been nominated for Emmy Awards on four other occasions for his role as “Producer” of the Station’s public affairs shows. (Tr. 271:2-15, 272:1-6; GC Exh. 23, R Exhs. 29 - 31) In 2013, he was nominated as “Producer” of “*Good Day Street Talk.*” (GC Exh. 23) (emphasis added) In 2016, he was nominated as “Producer” of “*Good Day Street Talk Celebrates Black History Month.*” (R Exh. 29) (emphasis added) In 2018, he was nominated as “Producer” of “*Lyme & Reason 2.0: Lyme Disease & The Voices of Change.*” (R Exh. 30) (emphasis added) In 2020, he received three separate nominations for his role as “Producer” of “*Tower of Heroes: Stories From The Tower Climb Of One World Trade Center,*” “*Home For A Hero*” and “*Good Day Street Talk Celebrates Black History Month.*” (R. Exh. 31) (emphasis added)

The “Public Affairs” page on the websites for both WNYW and WWOR have, at all relevant times since 2007, identified Mr. Silvestri with the title of “Producer.” (Tr. 254:22 – 255:7) On WNYW’s website, the Station identifies Mr. Silvestri as “Producer” of “*Good Day Street Talk.*” (R Exh. 19) (emphasis added) Specifically, it states “[t]o suggest a topic for ‘Good Day Street Talk’ contact Producer Joe Silvestri at (212) 452-3812, or email him at Joe.Silvestri@foxtv.com.” (R. Exh. 19) (emphasis added) Likewise, the website for WWOR

identifies Mr. Silvestri as the “Producer” of *New Jersey Now* and asks the public to contact “Producer Joe Silvestri” to suggest a topic. (R Exh. 20) (emphasis added)

Since the Station hired Mr. Silvestri in 2005, it has issued him 14 detailed annual written job performance evaluations. (R Exh. 4, GC Exhs. 8 - 19 Tr. 151:18-19) In every Annual Performance Evaluation issued since 2008, it has described his role as producer of the Station’s public affairs shows and praised him for his producing work. (GC Exhs. 8 – 19) For example, on a September 17, 2013 evaluation Mr. Silvestri’s supervisor wrote that Mr. Silvestri’s “[m]ajor accomplishments include producing the Hard Rock Rocks Times Square St. Mary’s 3 hour special; PSA’s for Sandra Lee’s The World’s Largest Bake Sale; a Black History Month special; and receiving an Emmy nomination for Street Talk.” (GC Exh. 13) In his evaluation from the following year, on July 29 2014, his supervisor wrote “Joe continues to demonstrate his abilities as an accomplished, creative and hard-working television producer.” (GC Exh. 14) On a September 26, 2016 evaluation, Mr. Silvestri’s boss wrote “Joe has produced several half-hour specials, including specials on St. Mary’s Rocks Times Square, Black History Month and the Tower of Heroes stair climb... Besides these specials projects, Joe continues to produce our Public Affairs shows, Good Day Street Talk and New Jersey Now.” (GC Exh. 16) In the following year’s evaluation, on August 7, 2017 Mr. Carlin wrote “Joe’s accomplishments are many, most notably winning a New York Emmy Award for producing a special on Lyme Disease which is a station wide initiative. Joe also produced other outstanding specials this past year, including one for Black History Month and another about the stair climb up One World Trade Center called Tower of Heroes. Joe is an extremely strong producer.” (GC Exh. 17) On September 21, 2018, Mr. Carlin wrote that Mr. Silvestri “has accomplished a lot in the past year, including producing two weekly series: Good Day Street Talk and New Jersey Now. He also produced outstanding half-hour specials, which includes Black History Month & Tower of Heroes.” (GC Exh. 18)

In his most recent Annual Performance Evaluation, Mr. Silvestri received praise from Mr. Carlin, who wrote “[n]ot only does Joe produce high quality half-hour specials, he also produces two weekly public affairs shows, Good Day Street Talk for Fox 5 and New Jersey Now for My 9. Both shows are very well produced and topical in nature.” (GC Exh. 19)

Mr. Silvestri’s superiors and colleagues at the Company and his acquaintances in the industry and community all know him as the “Public Affairs Producer.” They address him using

the title “Public Affairs Producer” or “Producer.” At the hearing, Mr. Silvestri identified 30 emails from 2014 to 2019 that he received or exchanged with others and in which he is referred to as the Station’s “Public Affairs Producer” or “Producer.” (R Exh. 33, Tr. 279:19-281:3) For example, Dianne Doctor, the General Manager and Vice President of WWOR, regularly refers to Mr. Silvestri as Public Affairs Producer in response to proposals to cover topics on New Jersey Now. In a December 12, 2016 email, Ms. Doctor wrote “I’m copying in Joe Silvestri the show’s producer in case you have questions.” (R Exh. p. 47) (emphasis added) On September 28, 2018 Ms. Doctor wrote “I’ve CC’ed Joe Silvestri, who is the producer. He can send you some potential taping dates-and follow up on your availability.” (R Exh. 33 p. 52) (emphasis added) On October 5, 2018, Ms. Doctor wrote “I’ve copied in the operations manager, Brian Quinn, and our producer, Joe Silvestri.” (R Exh. 33 p. 54) On February 19, 2019, Ms. Doctor received an email to which she responded that she is “copying in Joe Silvestri, who is the producer of NJ Now and oversees Community Affairs for WNYW.” (R Exh. 33, p. 55) (emphasis added) On March 5, 2019, in response to a request to confirm a date for a guest of the New Jersey Now, Ms. Doctor wrote “Yes... copying in Joe Silvestri, the Producer, who can answer all your questions!” (R Exh. 33 p. 56) (emphasis added) When exchanging emails with another guest of New Jersey now on August 15, 2019, Ms. Doctor wrote “great! Copying in Joe Silvestri, our producer, to give more details.” (R. Exh. 33 p. 63) (emphasis added) When writing another guest on August 20, 2019, Ms. Doctor wrote “I’m copying in Joe Silvestri, our producer to follow up.” (R. Exh. 33 p. 65) (emphasis added) On October 3, 2019, Ms. Doctor wrote to another guest of New Jersey Now “copying in Joe Silvestri our producer.” (R. Exh. 33 p. 66) (emphasis added) On October 3, 2019, Ms. Doctor wrote to request a New Jersey State senator be a guest on New Jersey Now, stating “I’ve copied in Joe Silvestri, producer in charge, if you have any questions or concerns.” (R. Exh. 33 p. 68) (emphasis added) On January 2, 2020, Ms. Doctor wrote to Governor Phil Murphy’s Office to request that he be a guest on New Jersey Now (R. Exh. 33, p. 82). In the email, she wrote “I’ve CC’ed Joe Silvestri, our producer, as well.” (R Exh. 33 p. 73) (emphasis added)

In a September 24, 2015 email, Antwan Lewis, the on-air host of *Good Day Street Talk*, responded to a request to cover a topic by writing, “Joe Silvestri is my producer. I’m going to fwd this on to him for story consideration.” (R. Exh. 33 p. 14) (emphasis added) On October 13, 2015, Mr. Lewis received an email proposing Good Day Street Talk do a piece on a nonprofit

that helps put healthier meals in schools. Mr. Lewis responded “sounds good. I’m gonna fwd this email to my Producer, Joe Silvestri for him to folo [sic] up on.” (R Exh. 33, pgs. 24 – 25) (emphasis added) On November 30, 2016, Mr. Lewis again states “I’m gonna CC my Producer Joe on this as he’s the best ace in charge of that,” in response to an email pitching a novel centered around international adoption. (R. Exh. 33 P. 44) (emphasis added)

It is significant that Mr. Silvestri represents himself as the “Producer” of the Station’s public affairs programming to guests, coworkers and the community and does not use some other title. At the hearing, Mr. Silvestri identified 14 emails from 2014 to 2019 that he received or exchanged with others and in which he refers to himself as the Station’s “Public Affairs Producer” or “Producer.” (R Exh. 32, Tr. 273:21 – 274:5) For example, in a September 29, 2014 email, Mr. Silvestri introduces himself as “the producer of New Jersey Now.” (R Exh. 32 p. 2) (emphasis added) In an August 24, 2015 email, Mr. Silvestri wrote to the Toys for Tots program to add the program details to the Station’s community calendar. In the email he writes “I am the public affairs producer for Fox 5 / WNYW in NYC.” (R Exh. 32, p. 6) (emphasis added) Likewise, on October 18, 2017, Mr. Silvestri stated he “produce[s] a public affairs show called Good Day Street Talk” when soliciting the head of a nutrition company to be a guest on the show. (R Exh. 32, p. 9) (emphasis added) On May 26, 2017, Mr. Silvestri wrote to a representative of the YMCA to for a piece on the YMCA in Coney Island. In the email, Mr. Silvestri wrote “I am a producer for Fox 5 / WNYW.” (R Exh. 32 p. 17) (emphasis added) Recently, on August 21, 2019, Mr. Silvestri sent an email to the Jewish Federation of NJ invite a representative to participate in a panel discussion on antisemitism in the New York area. In the email, Mr. Silvestri introduces himself as “producer for the public affairs show ‘New Jersey Now.’” (R Exh. 32, p. 51) (emphasis added)

Even Mr. Silvestri’s Company-issued security identification badge, which was issued in 2016, still identifies him as the Station’s “Public Affairs Producer.” (Tr. 176:24-177:1, 177:17-178:23) (emphasis added)

The Union’s President admitted that when the Union agreed in 2010 to allow public affairs producers to edit, he knew and understood that Joe Silvestri was a producer in the Public Affairs Department at that time. (Tr. 72:23-74:3, 83:21-84:16) He also admitted that he knew that Mr. Silvestri was the only person to produce the Station’s public affairs shows from 2010 to the present. (Tr. 83:21-84:16) He testified as follows:

Q. And during that period in 2009, '10, '11, did you understand that [Mr. Silvestri] produced the public affairs shows?

A. Yes.

Q. And how about from 2015 to 2019? Is it your understanding that he performed a function [the] function of producer for public affairs shows?

A. Yes.

Q. Okay. Anyone else perform the role of producer that you are aware of from 2010 to 2020.

A. No.

(Tr. 83:21-84:16)

Later under cross examination, the Union's President testified:

Q. Yeah, I just - - my question Nick is from 2015 to today, what is your understanding of who [per]forms the job of producer of the public affairs programs?

A. Joe Silvestri.

(Tr. 119:20-120:8)

Similarly, the Union's Treasurer, Donna Biglin, admitted that Mr. Silvestri was the only public affairs producer at the Station. On cross examination, the Union's Treasurer testified as follows:

Q. Is it your understanding that Mr. Silvestri performed those [producer] functions with respect to public affairs programs?

A. Yes

Q. Did he perform those functions in the last five years[s]?

A. Yes

Q. Are you aware of anyone else that performed those [producer] functions for public affairs programs in the last five years?

A. No, I am not aware of anybody.

(Tr. 135:9-16)

The Union's Treasurer testified that she knew Mr. Silvestri, that she would say hello to him and that they would talk a lot about "the New York Giants, - - like, work-related things and all sorts of - - you know, nothing [on] one topic, but - -." (Tr. 124:25-125:9)

Mr. Silvestri testified that although he often visited the Union President's work area and speaks with him regularly, the Union's President never claimed that Mr. Silvestri was not a producer prior to the Union's 2019 grievance. (Tr. 241:2-6, 249:10-12, and 249:25-250:3) Mr. Silvestri said that there was not a single bargaining unit employee that claimed he was not a producer prior to the Union's 2019 grievance. (Tr. 250:8-10) He said he worked closely with four IATSE-represented photographers from 2015 to the present and none of them ever claimed he was not a producer or objected to him editing the public affairs material they photographed. (Tr. 250:11-251:24)

At all relevant times, Mr. Silvestri performed the non-linear editing for all the public affairs shows he produced. (Tr. 235:14-237:16) When the Union agreed in 2010 to allow public affairs producers to edit, Mr. Silvestri received an email from the Station's Vice President of Engineering, Al Shjarback, informing him that that he was free to edit his own public affairs shows. (R Exh. 11, Tr. 221:1-224:23, 316:10-319:13) Mr. Silvestri said he has done all the editing for his public affairs shows since that time. (Tr. 237:11-16)

As part of the editing process, Mr. Silvestri regularly visited the work area of the Union President on the third floor. (Tr. 238:7-239:14, 239:25-241:6) He did this while the video material from his public affairs show was "ingested" into the Station's computer system. (Tr. 237:11-247:16; R Exhs. 17, 18). When Mr. Silvestri went to the third floor, he worked just five feet away from the Union's President and the two often spoke. (Tr. 247:1-7) He said the Union's President never questioned his role as a producer and never objected to him performing editing functions. (Tr. 239:1-250:10, 247:13-248:1)

The Union's President admitted that during the last five years, he often saw Mr. Silvestri at work and talked to him. (Tr. 45:12-18, 47:8-11, 87:10-20) He explained that Mr. Silvestri "frequented" the "Ingest" area that was adjacent to his own work station. (Tr. 45:15-18) He said he saw Mr. Silvestri in the ingest area "at least once a week, maybe twice a week." (Tr. 86:4-20) He testified that Mr. Silvestri's seat in the Ingest area was just 10 or 12 steps from his own seat. (Tr. 85:18-86:3) The Union's President knew and understood that Mr. Silvestri was in the Ingest area because he was editing. He explained that Mr. Silvestri needed to go to the Ingest area to download video material into the computer system before he could edit. (Tr. 86:21-87-9) The Union's President said he would talk to Mr. Silvestri and that he knew him well enough to ask him for a Station-labeled coffee mug from the Public Affairs Department. (Tr. 88:5-10)

The Union's President admitted that prior to 2019, the Union never objected to Mr. Silvestri editing. (Tr. 87:10-24) He admitted that from 2010 to the present, Mr. Silvestri satisfied the important requirement in Section 1.09(b) that producers must have a direct editorial connection to the shows they edit. (Tr. 89:20-23)

Mr. Silvestri performed editing functions directly next to the Union's Treasurer, Donna Biglin, who is also an editor at the Station. (Tr. 138:1-21; 253:1-10). From March of 2018 to early 2019, the work station where Mr. Silvestri edited public affairs shows was just five feet from the work station of the Union's Treasurer. (Tr. 252:20-253:8) The Union's Treasurer corroborated Mr. Silvestri's testimony. She testified that she worked six feet away from Mr. Silvestri and observed him editing on the equipment "directly to her left." (Tr. 137:24-138:21) Even though she witnessed Mr. Silvestri editing for months, she never once objected and never claimed he was not a producer. (Tr. 253:7-17)

D. Mr. Silvestri's Additional "Manager" Title

In 2007, the Station employed three producers in the public affairs department including Mr. Silvestri. (R. Exhs. 6 and 7, Tr. 166:24 -171:11) By 2009, two of the three producers were laid off, leaving Mr. Silvestri as the only public affairs producer in the department. (Tr. 166:24 - 167:23) Prior to 2015, Mr. Silvestri had a supervisor, Senior Director of Public Relations and Public Affairs Audrey Pass. (Tr. 295:13) Ms. Pass was responsible for coordinating publicity for the Station and its on-air personalities, as well as overseeing the Public Affairs Department. (Tr. 205:10-19) Ms. Pass never produced any Public Affairs programming during her employment at the Station. (Tr. 295:20-21).

Ms. Pass' employment terminated in early 2015 leaving Mr. Silvestri as the only remaining employee in the Station's Public Affairs Department. (Tr. 192:4, 195:23-24) The Station eliminated the position previously held by Ms. Pass and instead had Mr. Silvestri report directly to Dan Carlin, the Station's Vice President of Creative Services. (Tr. 174:13-16, 289:17-22, and GC Exh. 6)

The Union's President and Treasurer both admitted that they knew that Ms. Pass was a manager in the Public Affairs Department and that she left her employment. (Tr. 111:20-112:10, 117:5-118:4, 122:23-123:19) When Ms. Pass' employment was terminated and she was not

replaced, the Union knew that Mr. Silvestri was the only person in the Public Affairs Department from 2015 to the present.

In 2015, the Station sought to increase Mr. Silvestri's pay because he was the only remaining employee in the Public Affairs Department and its only producer since 2010. (Tr. 195:23-24, GC Exh. 5) On August 12, 2015, Human Resources Director Roselyn Barranda sent an email to senior executives requesting that Mr. Silvestri receive a 22.6 per cent increase in salary. (GC Exh. 5, GC Exh. 15) In order to justify the substantial salary increase, Ms. Barranda requested that Mr. Silvestri also receive "a new title of Public Affairs Manager." (GC Exh. 5; Tr. 194:20-195:14) Ms. Barranda's email did not say that Mr. Silvestri would no longer be the Station's Public Affairs Producer. Instead, she wrote that Joe has "been the 'behind-the-scenes' guru of the department, maintaining our FCC filing, in addition to producing our station's public affairs programming and working with community leaders on a weekly basis." (GC Exh. 5) (emphasis added) In the same email, she called the promotion a "salary promotion." (GC Exh. 5) Her request for the salary promotion was immediately approved. (GC Exh. 5)

Mr. Silvestri learned of his new title from his boss, Dan Carlin, who told him that he was receiving a pay increase and the title of "Public Affairs Manager." (Tr. 289:19 – 290:15). After thanking Mr. Carlin, Mr. Silvestri asked him whether his responsibilities would change. (Tr. 290:7-8) In response, Mr. Carlin said to Mr. Silvestri "keep on doing exactly what you have been doing." (Tr. 290:12)

Aside from the increase in salary, Mr. Silvestri did not receive any additional benefits. (Tr. 290:15-16) He did not get an office. (Tr. 291:293:7) He did not supervise any employee nor did have authority to hire or discipline any employee. (Tr. 293:14-15) He did not have authority to assign work, and still had to ask News Department managers to assign technicians to work with him. (Tr. 293:294:4) At the hearing, neither General Counsel nor the Union produced any evidence that Mr. Silvestri's job duties changed in any way whatsoever after he received the additional manager title in August 2015.

After August 2015, Mr. Silvestri continued, just as he had done from 2009 to 2014, as the only person performing the producer function for the Station's public affairs programs and the only person holding the title of "Public Affairs Producer" at the Station. (Tr. 290:20-291:13) His performance appraisals after 2015, including those he received in 2016, 2017, 2018 and 2019, all compliment him on his continued work producing the Station's public affairs work.

(GC Exhs. 16 - 19) As noted above, from 2015 to the present, he held the title of “Public Affairs Producer” in the credits of the public affairs shows, on the Station’s websites, on his Emmy awards and on his Emmy award nominations. He continues to hold himself out to the public as the Station’s Public Affairs Producer and his superiors, colleagues and persons in the community still know him as the Station’s only Public Affairs Producer.

At no point has Mr. Silvestri ever relinquished his title or role as the “Public Affairs Producer” at the Station. The General Counsel and the Union both failed to produce any evidence whatsoever identifying any other person who performed the job function of a public affairs producer at any relevant time besides Joe Silvestri. Likewise, they failed to produce any evidence whatsoever identifying any other person who held the title of “Public Affairs Producer” at any relevant time besides Joe Silvestri. Indeed, it is un rebuttable that, at all relevant times, Mr. Silvestri has been the only person at the Station who both performs the job functions of a public affairs producer and holds the title of “Public Affairs Producer.”

E. The Union’s Grievance

Even though the Union knew that Joe Silvestri was the only Public Affairs Producer at the Station since 2010 and had been editing his own shows since that time, the Union filed a grievance in 2019 claiming that his editing suddenly violated the collective bargaining agreement. (GC Exh. 22, Tr. 90:3-5) At meetings with management to address the grievance, the Union indicated that its grievance about Mr. Silvestri was pure “form over substance.” Specifically, the Union’s President told the Station’s managers that the grievance would be resolved and Mr. Silvestri could keep on editing if the Station merely changed his title. (Tr. 92:2-5)

At the hearing, the Union’s President confirmed that the grievance was not substantive. He was asked on cross examination: “Other than the title, were you okay with Mr. Silvestri editing?” (Tr. 92:22-23) He responded “Right, the union’s position was Joe Silvestri as producer of public affairs, was allowed to - - I don’t know if that answers your question.” (Tr. 92:22-93:17) In other words, the Union wanted the Station to take away Mr. Silvestri’s additional manager title and restrict him to only the title of “Public Affairs Producer.” If the Station did that, the Union was unconcerned that the editing of the public affairs shows was not being done by bargaining unit employees.

When Station management did not agree to the Union's hyper-technical demand to take away Mr. Silvestri's additional manager title, the Union filed the instant Charge with the NLRB on August 9, 2019. (GC Exh. 1)

F. Bargaining Unit Editors Lost No Work Or Wages

Although the Charge alleges that the Company unlawfully changed terms and conditions of bargaining unit employees causing them to lose wages, neither the General Counsel nor the Union presented any evidence whatsoever to support the allegation that any bargaining unit employee lost work opportunities or wages. In fact, the Union's President admitted that he did not bother to check and, therefore, he did not know whether persons in the bargaining unit who performed editing work lost work opportunities or wages. (Tr. 98:6-99:11) He also admitted that if Mr. Silvestri did not perform the non-linear editing for the Station's public affairs, bargaining unit employees would not necessarily get the work. (Tr. 117:1-4) He admitted that if Mr. Silvestri did not perform the editing, the Station was free to appoint another non-bargaining unit person as the producer of public affairs who could do the editing instead of a bargaining unit person. (Tr. 115:19-117:4) Again, the Union's President admitted that there was no limit in Section 1.09(b) to the number of non-bargaining unit producers the Station could assign to edit its public affairs shows. (Tr. 75:10-20)

The Company, however, did check to see whether persons in the bargaining unit who performed editing work lost work opportunities or wages. The Company's payroll records established that bargaining unit employees lost no editing work whatsoever as a result of Mr. Silvestri performing editing work after 2015, the year of the alleged an unlawful change. The bargaining unit employees who performed editing, including both "editors" and "photographers," saw no diminution in the total amount of their regular pay and overtime pay in the years after 2015 when compared to the years prior to 2015. (R Exh. 10) To the contrary, the total amount of regular pay and overtime pay for the group stayed the same and even went up the years after 2015 compared to the years 2011, 2012, 2013 and 2014. (R Exh. 10, Tr. 182:2-10) Notwithstanding the Union's efforts at the hearing to distract attention away from the Company's payroll records by suggesting they did not include data for two or three employees, it still produced no evidence whatsoever to support the claim that bargaining unit employees lost any work, work opportunities or wages as a result of editing performed by Mr. Silvestri.

IV. ARGUMENT

A. The Union's Charge Alleging That An Unlawful Change Occurred In 2015 Is Time-Barred.

The Union's Charge is time-barred under Section 10(b) of the Act. Section 10(b) provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. Section 160(b). The 10(b) limitations period commences when the aggrieved party has notice of the conduct that constitutes the alleged unfair labor practice. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005). Once the charging party is on notice, it cannot challenge the employer's alleged unlawful act or practice more than six (6) months following that notice. See *The Arrow Line, Inc.*, 340 NLRB 1 (2003); *Continental Oil Co.*, 194 NLRB 126 (1971).

The requisite notice for Section 10(b) may be constructive notice even if there is no actual notice. *Vanguard Fire & Security Systems*, 345 NLRB at 1016 (citing *Concourse Nursing Home*, 328 NLRB 692, 694 (1999)). There is sufficient notice under Section 10(b) if the party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); and *Moeller Bros. Body Shop*, 306 NLRB 191, 192 (1992). "A party is charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366, 368 (2005) (citing *Phoenix Transit System*, 335 NLRB 1263, fn. 2 (2001) (Section 10(b) precludes claim where charging party was "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred")). If a party "'ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[,]' and 'whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led.'" *Miramar Hotel Corp.*, 336 NLRB 1203, 1252 (2001) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); see also *Mathews-Carlsen Body Works*, 325 NLRB 661, 662 (1998) (finding that had the union exercised reasonable diligence, the union would have become aware that Respondent had not made fringe benefit payments on behalf of a majority of the employees); *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191 (1992) (holding that the "Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual non-

compliance”); *Nida v. Plant Protection Assoc. Natl.*, 7 F.3d 522, 525 (6th Cir.1993) (finding that the 10(b) time period “accrues from the date that the plaintiff ‘discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.’”)

The reason why there is a six-month statute of limitations in the Act is to bar consideration of events “after records have been destroyed, witnesses have gone elsewhere, and recollection of events in question have become dim and confused.” *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1157 (10th Cir. 2000) (citing *Bryan Mfg.*, 362 U.S. 411, 419, 80 S. Ct. 822 (quoting H.R.Rep. No. 80-245 at 40 (1947))) The six-month statute of limitation provides “a measure of repose, a point at which an entity is free to make plans without the specter of legal proceedings. *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, n. 4 (D.C. Cir. 2001) (citing *3M Co. v. Browner*, 17 F.3d 1453, 1453 (D.C. Cir. 1994)). This repose is important in labor relations because Section 10(b) promotes labor peace by “stabilizing existing bargaining relationships.” *Ross Stores*, 235 F.3d, at n.4 (citing *Bryan Mfg.*, 362 U.S. at 419, 80 S. Ct. 822).

Circumventing Section 10(b) using a continuing violation theory undermines its intended purpose. In *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 419 (1960), the Supreme Court recognized two policies underlying Section 10(b): (1) the statute of limitations bars litigation over distant events; and (2) it is meant to stabilize existing bargaining relationships. 362 U.S. at 419. The Board has found that extending the 10(b) period with a continuing violation theory undermines these policies. *A & L Underground*, 302 NLRB 467, 468-69 (1991) (repudiation of a collective bargaining agreement is not a continuing violation); *Chambersburg County Market*, 293 NLRB 654, 655 (1989) (refusal to execute a collective bargaining agreement is not a continuing violation).

In *A & L Underground*, the Board explained why extending the filing period for an unfair labor practice charge impairs the adjudication process. It stated “[A] respondent's ability to prepare a defense is increasingly prejudiced as those circumstances [giving rise to the charge] become more distant in time and pertinent evidence grows increasingly stale.” 302 NLRB at 468-69 (citing *Machinists Local 1424*, 362 U.S. at 419). “[A]s time passes “records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.” *Id.* at 468-69 (citing *Machinists Local 1424*, 362 U.S. at 419)]

The Board in *A&L Underground* also explained why a continuing violation theory is harmful to the stability of collective bargaining relationships. It stated “[i]t is hardly in the real

interest of the party desiring continued enforcement of the contract to allow the repudiating party to ignore the agreement indefinitely without being brought to book.” *Id.* at 468. Likewise, a party alleged to have violated the agreement, “should have the right to conclude after the 6-month limitation period has passed without charges being filed” that it is permitted to continue to do so. *Id.* The Board concludes that the violation theory “fails to foster a climate in which both parties to a collective bargaining relationship are able to assess their obligations to each other expeditiously and with reasonable certainty, and it thereby impairs the statutory goal of stabilizing collective bargaining relationships.” *Id.*

In the instant case, the Union alleges that a change in terms and conditions of employment occurred on or about July 2015, when Mr. Silvestri was editing after he received the additional manager title. However, the Union did not file its grievance objecting to Mr. Silvestri’s editing until February 2019, almost four years after the alleged unlawful change. It did not file its NLRB Charge until August, 2019.

Both Union representatives who testified at the hearing admitted that they knew Mr. Silvestri had been editing all the Station’s public affairs programs for the last 10 years. The Union claimed they did not object to Mr. Silvestri’s editing because they did not know what job he held until 2019. However, in the last 4 years, the Union’s President saw Mr. Silvestri in his work area multiple times per week. When he did see him, Mr. Silvestri was just a few feet away from the Union’s President and the two would talk. He said he knew Mr. Silvestri well enough to ask him for Station-labeled coffee mugs from the Public Affairs Department. The Union’s President admitted that he knew Mr. Silvestri was the only Public Affairs Producer at the Station since 2009 and that he was editing the Station’s public affairs shows.

The Union’s treasurer is an editor in the bargaining unit at the Station. During the period from March 2018 to early 2019, she worked directly next to Mr. Silvestri and observed him editing a few feet away. She also admitted that she knew he was the only Public Affairs Producer at the Station and edited his own shows.

At the hearing, the Union claimed that if a Public Affairs Producer has an additional manager title, he or she is no longer allowed to edit under Section 1.09(b). If that person does edit, the Union claims that such editing violates the collective bargaining agreement because it is not consistent with the intent of Section 1.09(b) and not what the Union agreed to when it signed the contract. Even if this was true, which the Company denies, why did the Union’s

representatives watch Mr. Silvestri edit all the Station's public affairs shows every week for the last ten years, including the last four years, and never object or make a single inquiry about his job or job title? By not objecting or inquiring, the Union made the Station believe that the Union agreed that the editing performed by Mr. Silvestri was compliant with the parties' collective bargaining agreement.

The Union certainly had reason to ask about Mr. Silvestri's job or job title. The Union's President repeatedly testified that one of his "primary responsibilities" was to ensure that the collective bargaining agreement was followed. He emphasized that his job as Union President is to ensure that jurisdictional provisions are honored by the Company. With respect to Section 1.09(b) regarding editing, he asserted that "[i]t was very significant" and that the Union gave "careful consideration" to deciding "which, if any titles would be included in the exceptions under Section 1.09(b)."

The Union also had reason to inquire about Mr. Silvestri's job or job title because it knew that Audrey Pass was in the Public Affairs Department and believed she held the title "Manager of Public Affairs." The Union's representatives both testified that they knew Ms. Pass left her employment at the Station. When Ms. Pass' employment was terminated and she was not replaced, the Union knew that Mr. Silvestri was the only person in the Public Affairs Department from 2015 to the present.

The Union's Charge is time-barred under Section 10(b) of the Act because the Union should have known of Mr. Silvestri's job and/or additional title with the exercise of any reasonable diligence. Incredibly, despite the Union's claim that it gave careful consideration to deciding which titles could edit under Section 1.09(b), the Union exercised no diligence whatsoever. The Union's President could easily have asked Mr. Silvestri about his job and/or job title since he saw him two or three times per week in his work area and the two talked. Likewise, the Union's treasurer could have asked Mr. Silvestri about his job during the over nine-month period from March 2018 to early 2019 when she worked a few feet away from him while he was editing.

The Union's President could have easily asked Station management, including Human Resources Director Roselyn Barranda or Vice President of Creative Services Dan Carlin, about Mr. Silvestri's job either by email or by visiting their offices. The Union could have easily served an information request on Station management or the Company's Labor Relations

Department. As evidenced by General Counsel Exhibits 7 and 24 in the record, the Union's President, its treasurer or any other Union representative employed at the Station could easily have identified Mr. Silvestri's title by typing his name into the Station's employee directory in its Microsoft Outlook email system or by checking his LinkedIn profile on the internet.

The Union did not bother to do any of the simple things described above to find out about Mr. Silvestri or his job. The Union made no inquiry at all even though its President claimed it his primary responsibility is to ensure that the Company honors Section 1.09(b).

The continuing violation theory should not be applied in the instant case to allow the Union to circumvent the statute of limitations in Section 10(b) of the Act. Section 1.09(b) was negotiated into the agreement in 2010. The Union then watched Mr. Silvestri edit his public affairs shows for nine years from 2010 to 2019 and never objected or inquired with the Station. In 2019, the Union filed its grievance, suddenly claiming for the first time that a change occurred four years prior in 2015 that violated the agreement negotiated nine years ago. The events of the instant case are exactly the type of circumstances where the Board and the Supreme Court have enforced Section 10(b) and refused to allow a claim under a continuing violation theory. As cited above, the Board and the Court have agreed that, after so many years without objection by a union, the adjudication process is impaired and the employer's ability to defend itself is prejudiced.

If applied here, the continuing violation theory would also harm the stability of the collective bargaining relationship. If the Company's rights and obligations are subject to question even after many years of Mr. Silvestri editing in plain sight of the Union and its officials without objection from them, the Company and the Union can never have any certainty in the agreements they reach.

B. No Change In Wages, Hours Or Other Terms and Conditions Occurred Because Mr. Silvestri's Editing Has Been The Status Quo Since 2010.

The Charge should be dismissed because the overwhelming evidence at the hearing established that the Company did not change any wages, hours or other terms and conditions of employment of any bargaining unit employees. An employer violates Section 8(a)(5) if it makes a unilateral change in wages, hours or other terms and conditions of employment without first giving the Union advance notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736,

743 (1962). Where an employer's action does not change existing conditions, the employer does not violate Section 8(a)(5) of the Act. *The Post Tribune Company*, 337 NLRB 1279, 1280 (2002); *House of Good Samaritan*, 268 NLRB 236, 237 (1983).

When a collective-bargaining agreement expires, an employer must maintain the "status quo" on wages, hours, and other terms and conditions of employment until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Mount Hope Trucking Co.*, 313 NLRB 262 (23, 1993); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); *Laborers Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 fn. 6 (1988); *NLRB v. Katz*, 369 U.S. 736 (1962). If an employer maintains the status quo, it does not violate Section 8(a)(5).

It is well-established that "the status quo is . . . defined by reference to the substantive terms of the expired contract." *PG Publishing*, 368 NLRB No. 41, p. 3 (2019) (citing *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970)). In the instant case, Section 1.09(b) of the parties' expired collective bargaining agreement defines the status quo. It establishes that any non-bargaining unit employee performing the job, job function or role of "Public Affairs Producer" may edit the Station's public affairs shows.

The Company and the Union agreed in 2010 to add Section 1.09(b) to the Agreement in order to allow non-bargaining unit employees to edit as long as they have an editorial connection to the shows they edit. By the express terms of the second sentence of Section 1.09(b), the Company and the Union agreed that bargaining unit employees would continue to edit promos and news pieces, but not the Station's public affairs programs. This sentence in Section 1.09(b), in and of itself, means that the Union agreed that bargaining unit employees would no longer edit the Station's public affairs shows. The Union knew that the Station's public affairs shows amount to just one hour of programming per week compared with 40 to 50 hours of news programming that bargaining unit employees still edit.

Section 1.09(b) sets forth the jobs of the employees who can edit and lists "Public Affairs Producer" as one of them. It establishes that an employee's job title is not dispositive of who is permitted to edit. The provision does not contain the term "job title" or "title" at all. Instead, it refers to the jobs listed as "job categories" and expressly states throughout that the employee's "job", "job function" or "role" determines whether he or she is allowed to edit. The parties even provided a written example in Section 1.09(b) explaining that an employee who does not have a

job title matching the jobs listed therein may nevertheless still edit if the employee is performing the role or function of one of the jobs listed.

The Union's President admitted that the word "category" used in the collective bargaining agreement was meant to describe several jobs. He admitted that employees at the Station may have different jobs and hold more than one job title. He admitted that non-bargaining unit employees who do not have titles matching the jobs listed in Section 1.09(b) may still edit. He admitted that he was aware that the Station regularly assigns persons who do not have job titles that match the names of the job listed in section 1.09(b) to non-linear editing without objection from the Union.

Here, the editing Mr. Silvestri performs for the public affairs shows he produces has been the status quo at the Station since 2010. The Union's President admitted that when the Union agreed in 2010 to allow public affairs producers to edit, he knew and understood that Joe Silvestri was a producer in the Public Affairs Department at that time. He also admitted that he knew that Mr. Silvestri was the only person to produce the Station's public affairs shows from 2010 to the present. The Union's treasurer admitted that Mr. Silvestri was the only public affairs producer at the Station in the last five years before the hearing and that she was unaware of any other person who performed that job function at the Station. The Union's President admitted that he knew that Mr. Silvestri had been editing the public affairs shows he produced since 2010.

Even if Section 1.09(b) of the Agreement did use the term "job title", which it does not, or an employee's job title was the only relevant factor to determining whether the employee is allowed to edit under the contractual provision, which the Company denies, there was a mountain of evidence at the hearing establishing that Joe Silvestri has never relinquished the title of "Public Affairs Producer" since he took that job at the Station 13 years ago. At all relevant times, Joe Silvestri was, and is, the only "Public Affairs Producer" at the Station.

Mr. Silvestri became a Public Affairs Producer at the Station in 2007. The Union's President admitted that he knew Mr. Silvestri was the Public Affairs Producer when the Union agreed to add Section 1.09(b) to the Agreement in 2010. Mr. Silvestri has been the only employee at the Station with the title of "Public Affairs Producer since 2010 and he has produced every single public affairs show since 2009. Again, the Union's President admitted that he knew Mr. Silvestri was the only Public Affairs Producer at the Station since 2009 and the Union's

treasurer also admitted that she knew he was the only Public Affairs Producer at the Station and edited his own shows.

Since 2009, during any broadcast of the public affairs programming to the New York television market where credits roll at the end of the show, the Station identified Mr. Silvestri to the viewing public with the title of “Producer.” This occurred before and after 2015. On the websites for both WNYW and WWOR, the Station has identified Mr. Silvestri with the title of “Producer” of its public affairs shows before and after 2015. The public affairs shows Mr. Silvestri produced have been nominated for Emmy Awards and he has been identified with the title of WNYW’s “Producer” of those shows by the National Academy of Television. This occurred before 2015 in 2013 and 2014 and after 2015 in 2016, 2017 and 2019. For the Emmy Awards he won in 2017 and 2019, he was identified as with the title of WNYW’s “Public Affairs Producer.”

Mr. Silvestri’s superiors and colleagues at the Company and his acquaintances in the industry and community all know him and refer to him not as a manager but as the Station’s “Public Affairs Producer.” At the hearing, Mr. Silvestri identified 30 emails from 2014 to 2019 that he received or exchanged with others and in which he is referred to as the Station’s “Public Affairs Producer” or “Producer.” He identified another 14 emails from before and after 2015 where he identified himself to others in the industry and community not as a manager but as the Station’s “Public Affairs Producer” or “Producer.”

Even Mr. Silvestri’s security ID card, which was issued by the Station in 2016, identifies him with the title “Public Affairs Producer.”

C. The Alleged Hypertechnical Change Did Not Impact The Bargaining Unit.

The additional manager title the Station gave Mr. Silvestri on his Human Resources profile so it could grant him a substantial salary increase does not constitute an unlawful change in violation of Section 8(a)(5) of the Act. The Board has held that not all unilateral changes constitute a breach of the bargaining obligation. *Peerless Food Products*, 236 NLRB 161 (1978). To trigger the bargaining obligation under Section 8(a)(5) of the Act, the change imposed must be “material, substantial and significant” affecting the terms and conditions of employment for bargaining unit employees. *United Technologies Corp.*, 278 NLRB 306 (1986)

(citing *Peerless Food Products*; *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976); *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978).

Moreover, the Board has held that an employer's unilateral change does not violate the Section 8(a)(5) if it did not significantly impact tenure, security or work opportunities of bargaining unit employees. *Westinghouse Electric Corp.*, 150 NLRB 1574, 1576 (1965) (holding employer does not violate Section 8(a)(5) by unilaterally contracting out unit work where such contracting does not involve a departure from past practice, did not effect a change in terms and conditions of employment, and did not impair, significantly, tenure, security or work opportunities for bargaining unit employees). In *Westinghouse*, the Board held that there was significant impact on job opportunities because the record in that case failed to show even slow erosion of work opportunities for bargaining unit employees. *Id.* at 1576. See also *American Oil Co.*, 155 NLRB 639, 655 (1965) (contracting out unit work does not constitute a violation of the Act where it did not result in 'significant detriment' to the employees in the unit); *Kennecott Copper Corp.*, 148 NLRB 1653, 1656 (1964) (contracting out unit work does not constitute a violation of the Act because employees in the bargaining unit continued to work their regular 40-hour workweek); see also *Wincharger*, 172 NLRB 83, 87-88 (1968); *American Oil Co.*, 155 NLRB 639, 655 (1965); *Allied Chemical Corp.*, 151 NLRB 718, 719 (1965).

Similarly, the Board has held that so called "de minimis" changes to terms and conditions of employment do not trigger the bargaining obligation and may be implemented unilaterally without violating the Act. See, e.g., *MMC Materials, Inc.*, 2005 WL 2706008, at *11, 26-CA-21075, JD(ATL) (NLRB Div. of Judges, Oct. 18, 2005) (employer's unilateral change to bargaining unit employees' start times held to be de minimis); *Peerless Food Products*, 236 NLRB 161, 164 (1978) (employer's unilateral change to rule regarding union access to production floor held to be de minimis); *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976) (employer's unilateral implementation of more stringent and accurate time clock policy held to be de minimis). The rationale for this de minimis exception was expressed in Member Penello's concurring opinion in *Peerless Food Products* where he instructed that:

...General Counsel should exercise his discretion under Section 3(d) of the Act to refuse to process violations of minor or isolated character.... The Board has latitude not to burden itself and the courts with 'infinitesimally small abstract grievances.'....

Peerless Food Products, 236 NLRB, at 162 (quoting *John-Manville Products Corporation v. NLRB*, 509 F.2d 425 (C.A.D.C., 1974), enfg. 205 NLRB 387 (1973) (internal citations omitted).

Here, the Union claims that the editing Mr. Silvestri performed from 2015 to 2019 constitutes an unlawful change in terms and conditions for bargaining unit employees. The Union makes the claim while at the same time admitting that it knew Mr. Silvestri was the Station's only Public Affairs Producer from 2009 to the present and had been editing his own public affairs shows every week since 2010 when the Union agreed to allow him to do so. Importantly, neither General Counsel nor the Union produced any evidence that Mr. Silvestri's job duties changed in any way whatsoever after he received the additional manager title in August 2015.

The Union admitted that its claim is merely "form over substance." The Union's President told the Station's managers that Mr. Silvestri could keep on editing if the Station merely changed his title for all purposes. If the Station took away Mr. Silvestri's additional manager title, the Union was unconcerned that the editing of the public affairs shows was not being done by bargaining unit employees. The Union was not concerned about work opportunities for bargaining unit employees. It filed the instant Charge only because Station management did not agree to the Union's hypertechnical demand to take away Mr. Silvestri's additional manager title.

Neither the General Counsel nor the Union presented any evidence whatsoever to support the allegation that any bargaining unit employee lost work opportunities or wages. The Union could not cite one bargaining unit member who lost wages, hours or work as a result of Mr. Silvestri editing. Tellingly, the Union's President did not know whether bargaining unit employees lost work opportunities as a result of the alleged change in 2015 because, as he admitted, the Union did not bother to check. He also admitted that if Mr. Silvestri was not allowed to edit his public affairs shows in the future, bargaining unit employees would not necessarily get the work. He admitted that the Station was free to have Mr. Silvestri continue to edit by changing the title on his Human Resources profile or appoint or hire another non-union person as a producer to edit. He admitted that there was no limit to the number of non-bargaining unit producers the Station could assign to edit its public affairs shows.

In any event, the Company's payroll records showed that bargaining unit employees lost no editing work whatsoever as a result of Mr. Silvestri performing editing work after 2015. Both

“editors” and “photographers” in the bargaining unit capable of editing saw no diminution in the total amount of their regular pay and overtime pay in the years after 2015 when compared to the years prior to 2015. In fact, their total pay either stayed the same and or went up in each of the years after 2015 compared to the years 2011, 2012, 2013 and 2014.

Again, the Union produced no evidence whatsoever to support the claim that the bargaining unit or the employees in it lost any work, work opportunities or wages as a result of editing performed by Mr. Silvestri. This glaring lack of evidence means the hypertechnical change the Union alleges did not result in any “material, substantial and significant” change in terms and conditions of employment and the Company did not violate the Act.

V. CONCLUSION

For the reasons set forth above, the Company has not violated Section 8(a)(1) or 8(a)(5) of the Act and the Complaint should be dismissed in its entirety.

By: /S/ Kevin Casey

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